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No. 04-46

Supreme Court, U.S.
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In The

Supreme Court of the United States

KENDRA LYNN WATT,

Petitioner,

v.

THE STATE OF WASHINGTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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I. COUNTER STATEMENT OF CASE

On May 31, 2001, Robert Savage contacted Detective Rick Runge of the Tri-Cites Metro Drug Task Force (Metro) about a methamphetamine lab at the residence of the petitioner, Kendra Watt, and her husband James at 402 Abbott in Richland (RP[1] 13-14, 254-255). The petitioner, James, and three daughters were living at the residence on Abbott (RP 16-17, 52, 103, 105). A niece, Ashley, also either lived at the Abbott residence or visited frequently (RP 17, 52, 112).

Savage was acquainted with both the petitioner and her husband James (RP 12, 20). Before contacting Detective Runge, Savage had observed James Watt cooking methamphetamine in his garage on at least two occasions (RP 14, 19, 254-555). The petitioner was not in the garage during Savage's second visit, although Savage had observed her in the garage when methamphetamine was being cooked the first time (RP 20, 35, 42, 44-45, 50). However Ashley, who was approximately fourteen, was present in the garage on the second occasion methamphetamine was being manufactured, as was another adult male (RP 17, 19). During the second visit, Watt told Savage that he needed Toluene to finish the last batch of methamphetamine (RP 14).

Savage contacted Detective Runge because he was concerned about Ashley's involvement in the methamphetamine manufacture process, cleaning utensils. Savage himself had lost two nieces in a methamphetamine lab fire (RP 15, 17, 42). Savage told Detective Runge that he knew

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[1] Unless otherwise specified, RP refers to the March 18-20, 2002, verbatim report of proceedings of the petitioner's jury trial.

an individual that was manufacturing methamphetamine in a garage with children present, that they were preparing to cook another batch but couldn't get Toluene, and that they had asked him where they might be able to get some (RP 225). Detective Runge asked Savage if he would be able to introduce an undercover detective to provide Toluene in exchange for finished narcotics (RP 225). Savage told Detective Runge that he would check into it, but subsequently informed the detective that the defendant had already purchased five-gallons of Toluene from the Standard Paint store in Richland (RP 225). Detective Runge's independent investigation confirmed that a female meeting the petitioner's description and driving a vehicle seen at the petitioner's residence had in fact purchased five-gallons of Toluene from that store (RP 95-98, 227-228).

Savage did not request or receive any money or favors from Detective Runge or police in exchange for the information which he provided (RP 17-18, 224). His motivation for contacting the police was his concern for the children (RP 18).

Detective Runge applied for and obtained a search warrant for the petitioner's residence at 402 Abbott (RP 228). Metro officers executed the warrant on June 1, 2001 (RP 51-52, 228). Items found in the master bedroom included a black purse which contained two plastic baggies of methamphetamine and dominion papers for the petitioner, scales commonly used to measure narcotics, glass pipes, and receipts for items used in the production of methamphetamine such as HEET, lithium batteries, coffee filters, Toluene, dry ice, denatured alcohol, a coffee grinder, muriatic acid, and pseudoephedrine (RP 53-55, 60-65, 194-195, 204-205, 243-248). Additional methamphetamine and

baggies also were found in a safe in the bedroom (RP 66-72, 206). The petitioner also had a video surveillance camera set up allowing them to monitor the front exterior of their residence from their bedroom (RP 78).

The distinctive chemical odor associated with the methamphetamine manufacturing process was immediately noticeable when officers entered the Watts' garage (RP 230-231). The garage had been vented with tubing, apparently to relieve the buildup of the chemical fumes (RP 123-130, 233). In fact the tubing tested positive for the presence of methamphetamine (RP 149-150, 233).

Numerous items used in methamphetamine production were found in the garage. These included solvents, muriatic acid, tubing, a funnel with residue, extracted ephedrine, scales, a coffee grinder, coffee filters with methamphetamine residue, lithium batteries, lye, Coleman fuel, and water softener salt (RP 130-135, 137-144, 148-149).

A five-gallon container of Toluene was also found in the garage, consistent with the defendant's purchase of Toluene at the paint store (RP 156, 233-234). Although, anhydrous ammonia was not found, James Watt subsequently told Detective Runge that he manufactured the anhydrous ammonia himself (RP 249-250).

The petitioner was charged by amended information with Count I: Unlawful Manufacture of a Controlled Substance, Methamphetamine, with Notice of a Child Present on the Premises During Manufacture, Count II: Unlawful Possession of a Controlled Substance, Methamphetamine, and Count III: Criminal Mistreatment in the Second Degree (CP 174-175).

The petitioner's husband James Watt was also charged with manufacturing methamphetamine with children present, criminal mistreatment in the second degree, and possession of methamphetamine. He subsequently pled guilty to manufacturing methamphetamine and criminal mistreatment in the second degree (Ex. 83).

At trial, the State admitted pages one and seven of James Watt's seven-page Statement of Defendant on Plea of Guilty to establish that he had admitted to making methamphetamine in the detached garage, and that while the children weren't present while he was making the methamphetamine, they did live on the premises (RP 299, 314-317; Ex. 83). On page one, the statement was redacted to omit a reference to Watt's being charged with unlawful possession of a controlled substance. That reference had been lined out in the original statement. A reference to James Watt making methamphetamine for his wife was redacted on page seven (RP 295; Ex. 83). The trial court held that the statement was admissible as a statement against interest (RP 10-11).

The petitioner was found guilty as charged (CP 6-13, 115-118). She subsequently moved for a new trial based on the trial court's admission of her husband's redacted guilty plea statement and the court's omission of a limiting instruction (CP 95-104). Her motion was denied (4/19/02 RP 10-12; CP 46). She filed an appeal to the Washington State Court of Appeals and Supreme Court followed. The conviction was affirmed. The Writ for Certiorari herein followed.

II. SUMMARY OF ARGUMENT AGAINST GRANTING THE WRIT OF CERTIORARI

The admission of the statement on plea of guilty of the petitioner's husband had no effect on the case. It was

cumulative evidence that there was a methamphetamine lab at the petitioner's residence. It had no effect on her defense that she knew nothing about the methamphetamine lab and did not participate in it. Further, the statement on plea of guilty could have been introduced as a public record. The *Crawford* decision would not impact admission of the document in that fashion. *Crawford v. Washington*, 124 S.Ct. 1354 (2004). Finally, there are at least strong reasons why the *Crawford* decision should not be applied to the case herein: the document was presented to a judge, not a law enforcement officer. It was not the result of a colloquy with the judge. An opposing ruling would virtually eliminate the well-established hearsay exception of "statements against interest."

A. Since the petitioner's defense was that she was unaware of, and did not participate in, a methamphetamine lab, any error in admitting her husband's plea of guilty that he had a methamphetamine lab was harmless.

It is important to recognize what the petitioner's defense is. The petitioner did not challenge the fact that there was a methamphetamine lab at her residence. She did not argue that there was a benign explanation for the extracted ephedrine, muriatic acid, lithium batteries, coffee filters with residue, tubing, lye, funnels, denatured alcohol, HEET, and dry ice. Rather her defense was that she had no knowledge of such items.

If the petitioner had claimed the extracted ephedrine, muriatic acid, etc. did not constitute a methamphetamine lab, her husband's statement may have had some impact. If she had claimed that methamphetamine was not produced at her residence, again, her husband's plea may have had some impact. However, the above items proved beyond any doubt that there was a methamphetamine lab

at the defendant's residence. Her husband's plea merely confirmed that fact. The petitioner's defense was that she was unaware of the lab and did not participate in it. Therefore, admission of Mr. Watt's plea of guilty had no impact on this defense. Any error was harmless.

The same can be said regarding the statement of Mr. Watt to Detective Runge that he makes his own anhydrous ammonia. The State concedes that admission of such a statement is more unlikely than admission of the statement on plea of guilty. However, admission of this statement had no bearing on the trial. The petitioner's defense was that she was unaware of her husband's methamphetamine lab, not that he did not have one. The fact that the petitioner's husband operated a methamphetamine lab at their residence is consistent with her defense.

B. The statement on plea of guilty could have been admitted as a public document, under RCW 5.44.010, which would not involve *Crawford*.

Crawford v. Washington, 124 S.Ct. 1354, 158 L.Ed.2d 177, 72 USLW 4229 (2004) cited with approval hearsay exceptions, such as the business records exception, that were by their nature not testimonial. The Respondent suggests the same rationale should apply to the public records exception.

Revised Code of Washington (RCW) 5.44 codifies the public records exception to the hearsay rule. Under 5.44.010 a statement of plea of guilty qualifies as a public record. Assuming that the document is relevant and does not contain objectionable information (*i.e.*, opinion evidence) the document is admissible. *Washington v. Monson*, 113 Wash. 2d 833, 784 P.2d 485 (1989).

This principle has also been recognized by federal courts. In *U.S. v. Gotti*, 641 F. Supp. 283 (E.D. N.Y. 1986) held that Rule 803(8) (which is codified in RCW 5.44) provides an exception to the hearsay rule of "public offices" setting forth among other things "matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding however, in criminal cases matters observed by police officers and other law enforcement personnel." *Gotti*, supra, held the court is a "public office." The judge who took the plea is not a "law enforcement officer" and had a duty to report the fact of the plea when he or she signed the judgment. Therefore, the court held the fact of the plea was admissible under Rule 803 (8).

The Respondent did not argue at the trial court that the "public records" exception justified admission of the statement on plea of guilty. However, evidence is properly admitted if there is any basis to do so.

C. The *Crawford* case should not bar admission of Mr. Watt's statement on plea of guilty.

1. A statement on plea of guilty should not be considered "testimonial" evidence.

(a) The statement on plea of guilty is distinguishable from a colloquy with the defendant about his or her actions.

The Respondent concedes there is at least one case which applied *Crawford,* supra, to exclude admission of statements on plea of guilty. *U.S. v. Massino*, 319 F. Supp. 2d 295 (E.D. N.Y. 2004). However, in this case there was no admission of a colloquy between the judge and Mr. Watt about his actions. Further all references to the Petitioner

were deleted. The jury only knew the basic fact: Mr. Watt pled guilty and admitted that he operated a methamphetamine lab from his residence. The statement on plea of guilty was a fact, and did not involve testimony.

(b) The statement on plea of guilty was made to a judge, not a law enforcement agent.

Crawford, supra, emphasized the history of the Confrontation Clause and cited the role of justices of the peace under Marian statutes. Those judges were required to examine suspects and witnesses in felony cases and certify the results to the court. The examinations came to be used as evidence in some cases. Obviously, judges in the present day do not have such a role. They are not law enforcement officers, *Gotti,* supra, do not conduct pre-trial examinations of witnesses or suspects, and carefully safeguard a defendant's right against self-incrimination.

Crawford should not extend to situations where a co-defendant presents a document for a judge to review and approve.

(c) Cross-examination would have no bearing on the fact that the Petitioner's husband pled guilty.

Crawford emphasized the necessity for the possibility of cross-examination by the adverse party of the declarant. Generally cross-examination may shed light on a declarant's statement. However, it is difficult to see how cross-examination could shed any light on the fact that a defendant has pled guilty. In other words, in this case would Ms. Watt (the petitioner) cross examine her husband with

the hope of illustrating that he is not guilty? Would her attorney attempt to convince the court that Mr. Watt is not guilty, despite his written plea? How could this be done, given that the petitioner claimed she had no knowledge of her husband's methamphetamine lab?

Obviously, the Court's concerns about cross-examination are not fully applicable in the situation herein where the declarant pleads guilty.

2. A contrary result will virtually eliminate the hearsay exception of "statements against interest."

In *Crawford,* supra, the declarant's statement was not against her penal interest. Nevertheless, this hearsay exception is a firmly rooted doctrine. The Respondent respectfully suggests the court will have virtually eliminated this exception if the Writ is granted and the conviction overturned on the basis of admission of Mr. Watt's statement.

The Respondent cites the following from *Lilly v. Virginia,* 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999):

> We assume, as we must, that Mark's statements were against his penal interest as a matter of state law, but the question whether the statements fall within a firmly rooted hearsay exception for Confrontation Clause purposes is a question of federal law. Accordingly, it is appropriate to begin our analysis by examining the "firmly rooted" doctrine and the roots of the "against penal interest" exception.

> We have allowed the admission of statements falling within a firmly rooted hearsay exception since the Court's recognition in *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895), that the Framers of the Sixth Amendment "obviously intended to . . . respec(t)" certain unquestionable rules of evidence in drafting the Confrontation Clause. Justice Brown, writing for the Court in that case, did not question the wisdom of excluding deposition testimony, *ex parte* affidavits and their equivalents. But he reasoned that an unduly strict and "technical" reading of the Clause would have the effect of excluding other hearsay evidence, such as dying declarations whose admissibility neither the Framers not anyone else 100 years later "would have [had] the hardihood . . . to question."

III. CONCLUSION

For the above reasons the Court should not grant the Writ for Certiorari.

Respectfully submitted,

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APPENDIX

RCW 5.44.010
Court records and proceedings – When admissible.

The records and proceedings of any court of the United States, or any state or territory, shall be admissible in evidence in all cases in this state when duly certified by the attestation of the clerk, prothonotary or other officer having charge of the records of such court, with the seal of such court annexed.

[1997 c 358 § 7; Code 1881 § 430; 1877 p 94 § 432; 1869 p 115 § 426; 1854 p 195 § 334; RRS § 1254.]

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